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No. 02-1290

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD. AND ARTHUR WAH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The federal antitrust laws apply to a "person," which is defined to include "corporations and associations existing under or authorized by the laws of * * * the United States." 15 U.S.C. 7 (Sherman Act), 12(a) (Clayton Act). The question presented is whether the United States Postal Service is a "person" amenable to suit under the antitrust laws.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 302 F.3d 985. The opinion of the district court (Pet. App. 23a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2002. A petition for rehearing was denied on November 4, 2002 (Pet. App. 28a-29a). On January 23, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 4, 2003, and the petition was filed on that date. The petition was granted on May 27, 2003.

The jurisdiction of this Court rests under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at Pet. App. 30a-34a.

STATEMENT

1. Respondent Flamingo Industries (USA) Ltd., a manufacturer of plastic mail sacks, and its owner, respondent Arthur Wah, brought suit in the Northern District of California against the Postal Service based on its procurement decisions regarding certain mail sacks. In addition to claims under federal procurement law and California state law, the complaint asserted five federal antitrust claims alleging that the Postal Service had revised and disparately enforced its mail sack policies in order to suppress competition and create a monopoly in the production of mail sacks, which resulted in the Postal Service's buying cheaper mail sacks that were manufactured in Mexico.

The district court dismissed respondents' complaint in its entirety. Pet. App. 23a-27a. With respect to the antitrust claims, the district court held that Congress did not intend to impose antitrust liability on the Postal Service. *Id.* at 23a-24a. The district court observed that "[f]ederal instrumentalities are not liable under the antitrust laws." *Id.* at 23a. With respect to the Postal Service in particular, the district court explained that, although Congress in 39 U.S.C. 401(1) had enacted "a general waiver of sovereign immunity" by permitting the Postal Service to "sue and be sued" in its own name, "such language cannot * * * subject [the Postal Service] to liability under the antitrust laws as there was no attempt on the part of Congress to impose

liability in the first place." Pet. App. 23a-24a (internal quotation marks omitted).

2. The United States Court of Appeals for the Ninth Circuit reversed in relevant part, holding that the Postal Service is a "person" subject to liability and suit under the federal antitrust laws. Pet. App. 1a-22a. The court of appeals acknowledged (*id.* at 4a) that a federal agency's amenability to suit is determined by the two-step inquiry set forth in *FDIC* v. *Meyer*, 510 U.S. 471 (1994). Under that approach, courts must determine, first, whether Congress has waived the agency's sovereign immunity and, second, whether "the source of substantive law upon which the claimant relies provides an avenue for relief" against the federal government. *Id.* at 484.

Applying Meyer's first step, the court of appeals held that Congress waived the Postal Service's sovereign immunity by providing in 39 U.S.C. 401(1) that "[t]he Postal Service shall have the . . . power[] to sue and be sued in its official name." Pet. App. 4a (brackets in original). In considering the second question, whether the antitrust statutes provide a substantive cause of action against the Postal Service, the court of appeals rejected the Postal Service's reliance on precedent (*e.g.*, *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), and *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982)) holding that the United States and its instrumentalities are not "persons" subject to suit under the antitrust laws. The court of appeals reasoned that, "[a]lthough a federal sovereign is not a 'person,' the Postal Service is not a sovereign" because the Postal Service does not enjoy sovereign immunity. Pet. App. 8a. The court accordingly concluded that "[t]he Postal Service's sue-and-be-sued waiver of immunity has created a presumption

that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation." *Id.* at 10a. The court concluded, however, that the Postal Service may assert "conduct-based" immunity as a defense to antitrust liability "if the action of the Postal Service being challenged was taken at the command of Congress." *Id.* at 13a.

With respect to respondents' non-antitrust claims, the court of appeals reinstated respondents' claim under 28 U.S.C. 1491(b)(1) that the Postal Service violated its own procurement manual provisions, but the court affirmed the dismissal of respondents' state law claims. Pet. App. 13a-22a. On the procurement claim, the court of appeals followed *Emery Worldwide Airlines, Inc.* v. *United States*, 264 F.3d 1071, 1080-1081 (Fed. Cir. 2001), in holding that the Postal Service is a "Federal agency" for purposes of 28 U.S.C. 1491(b)(1), which provides jurisdiction in the Court of Federal Claims (and in the district court in this case) over suits challenging contract actions by federal agencies that violate federal procurement laws or regulations. Pet. App. 15a; see also pp. 20-21, 32, *infra*. The court held that respondents' claims under state law barring fraudulent business practices were preempted by federal law. Pet. App. 19a-20a. The court explained that allowing state law to control the Postal Service's procurement decisions "would impinge" upon the right Congress conferred on the Postal Service under 39 U.S.C. 401(3) "to determine the character and necessity of its expenditures," and "would negate the deferential standard Congress has created for federal court review of [procurement] decisions" under 28 U.S.C. 1491(b)(1). Pet. App. 20a.

SUMMARY OF ARGUMENT

This Court held in *United States* v. *Cooper Corp.*, 312 U.S. 600, 604, 606 (1941), that the United States is excluded from the term "person" amenable to suit under the antitrust laws. That holding likewise applies to federal agencies and instrumentalities through which the United States acts. *E.g.*, *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243, 245 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982).

The Postal Service is such an entity. Postal operations historically have been carried out by the Executive Branch as a "sovereign function" and a "sovereign necessity," *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121 (1981), and that tradition was carried forward in creating the Postal Service "as an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. Under the Court's decision in *Cooper*, the Postal Service's character as an agency or instrumentality of the United States renders it not a person amenable to suit under the antitrust laws.

The Ninth Circuit erred in relying on the fact that Congress has authorized the Postal Service to "sue and be sued" in 39 U.S.C. 401(1). This Court concluded in *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (quoting *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983)), that such "reasoning conflates two 'analytically distinct' inquiries," first, whether Congress waived sovereign immunity and, second, whether Congress intended to create a cause of action against federal agencies in the first place. The waiver of sovereign immunity in 39 U.S.C. 401(1) does not by its own force create an antitrust action against the United States, since Congress did not intend that such an action may be

maintained against the United States. Nor does a waiver of sovereign immunity change the fact that the Postal Service remains part of the Executive Branch of the United States Government.

ARGUMENT

THE UNITED STATES POSTAL SERVICE, AS AN AGENCY OR INSTRUMENTALITY OF THE UNITED STATES, IS NOT A "PERSON" UNDER THE FEDERAL ANTITRUST LAWS

A. Agencies And Instrumentalities Of The United States Are Not "Persons" Under The Antitrust Laws

1. This Court held in *United States* v. *Cooper Corp.*, 312 U.S. 600, 604-606 (1941), that Congress did not intend the statutory term "person" as used in the antitrust laws to include the United States. The Court therefore rejected the federal government's contention that the United States is a "person" authorized to sue for treble damages under Section 7 of the Sherman Act, Act of July 2, 1890, ch. 647, 26 Stat. 210.[1] The Court found that, "[w]ithout going beyond the words of the section," "the phrase 'any person' is insufficient" to encompass the United States. *Cooper*, 312 U.S. at 606. The Court explained that, if the United States were a "person" entitled to sue, the United States would likewise be a "person" that "would be liable to suit for treble damages" under Section 7 of the Act, since "[i]t is hardly credible that Congress used the term 'person' in different senses in the same sentence." *Ibid.* "The

[1] Congress repealed Section 7 of the Sherman Act in 1955 because it was redundant in light of the treble damages provision of Section 4 of the Clayton Act, 15 U.S.C. 15(a), which Congress passed in 1914. See *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 644 n.16 (1981).

more natural inference," the Court concluded, "is that the meaning of the word was in both uses limited to what are usually known as natural and artificial persons, that is, individuals and corporations." *Ibid.*

The Court also looked to the surrounding provisions of the Sherman Act and observed that "[i]n §§ 1, 2, and 3 the phrase designating those liable criminally is 'every person who shall' etc." *Cooper*, 312 U.S. at 607. The Court found that "[i]n each instance it is obvious that while the term 'person' may well include a corporation it cannot embrace the United States." *Ibid.*; see also *id.* at 609 (noting with respect to criminal penalties and treble damages provisions of the Revenue Act of 1916 that "[i]t must be obvious that the United States cannot be embraced by the phrase 'any person'"). Additionally, the Court found that, although Section 8 of the Sherman Act specified that the term "person" included a corporation, "the argument that the United States may be treated as a corporation organized under its own laws * * * seems so strained as not to merit serious consideration." *Id.* at 607.[2]

In 1955, in response to the Court's decision in *Cooper*, Congress amended the Clayton Act by adding Section 4A, 15 U.S.C. 15A, to authorize the United States to bring a civil action for actual, but not treble damages. Act of July 7, 1955, ch. 283, § 1, 69 Stat. 282. "Although

[2] Subsequent decisions have recognized that the term "person" as used in the antitrust laws includes certain governmental bodies *other than the United States*, such as foreign countries (*Pfizer Inc.* v. *Government of India*, 434 U.S. 308 (1978)), States (*Georgia* v. *Evans*, 316 U.S. 159 (1942)), and municipalities (*Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906)). *Pfizer* and *Evans* also reaffirm *Cooper*'s holding that the United States is not a "person" under the antitrust laws. 434 U.S. at 316-317; 316 U.S. at 161-162.

Congress was well aware of the view the Court indicated in *Cooper Corp.*, that Congress had not described the United States as a 'person' for Sherman Act purposes, Congress addressed only the direct holding in that case—the ruling that the United States was not authorized to proceed as a Sherman Act treble damage action plaintiff." *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243, 245 (D.C. Cir. 1981) (R.B. Ginsburg, J.) (footnote omitted), cert. denied, 455 U.S. 919 (1982). "Given the discrete consideration Congress gave to the situation of the United States, after the decision in *Cooper Corp.*, as a Sherman Act damage action plaintiff, and the legislature's total silence on the situation of the United States as a Sherman Act defendant," the Court should not "engraft on the statute additions . . . the legislature might or should have made." *Id.* at 246 (quoting *Cooper Corp.*, 312 U.S. at 605).[3]

2. Just as Congress did not intend the United States to be a "person" under the antitrust laws, Congress did not intend agencies or instrumentalities of the United States to be "persons" under those laws. This Court has repeatedly held that when Congress excludes a sovereign from the statutory term "person," it equally excludes agencies and instrumentalities of the sovereign. The Court has thus concluded that state agencies are not persons liable under the False Claims Act, 31 U.S.C. 3729 (*Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 778-788 (2000)); that federal agencies are not persons under the

[3] In 1990, Congress amended Section 4A of the Clayton Act to authorize the United States to seek treble damages, but again did so without altering the statutory definition of the term "person" or the situation of the United States as a defendant. Pub. L. No. 101-588, § 5, 104 Stat. 2880.

removal provisions of 28 U.S.C. 1442(a)(1) (1988) (*International Primate Prot. League* v. *Tulane Educ. Fund*, 500 U.S. 72, 82-83 (1991)); that state agencies are not persons liable under 42 U.S.C. 1983 (*Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989)); and that federal instrumentalities are not persons under the Clean Water Act, 33 U.S.C. 1362(5) (*EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 222 n.37 (1976)). Where Congress intends a contrary conclusion, it has expressly so provided. See, *e.g.*, 15 U.S.C. 1127 (defining "person" amenable to suit under the Lanham Act to include "the United States [or] any agency or instrumentality thereof").[4]

The principle that the United States and its agencies and instrumentalities should be treated equally with respect to the general statutory term "person" reflects the practical reality that the federal government performs its public functions through many formally separate governmental bodies. Not surprisingly, with the exception of the decision below, the lower courts to have considered the issue have uniformly held that the exclusion of the United States from the term "person" applies with equal force to agencies and instrumentalities of the United States. *Sea-Land Serv., Inc.*, 659 F.2d at 247 (antitrust laws do not apply to actions by Alaska Railroad and related federal agencies); accord

[4] Similarly, governmental agencies and instrumentalities share equally in the immunity of the sovereign from suit. *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); see also *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 (1997) ("It has long been settled that the reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities.").

Name.Space, Inc. v. *Network Solutions, Inc.*, 202 F.3d 573, 580-581 (2d Cir. 2000) (National Science Foundation is not subject to the antitrust laws); *Rex Sys., Inc.* v. *Holiday*, 814 F.2d 994, 995-997 (4th Cir. 1987) (Department of the Navy is not a person under the Sherman Act); *Greenwood Utils. Comm'n* v. *Mississippi Power Co.*, 751 F.2d 1484, 1504 (5th Cir. 1985) (Southeastern Power Administration is, "of course, not subject to the antitrust laws"); *Jet Courier Servs., Inc.* v. *Federal Reserve Bank*, 713 F.2d 1221, 1228 (6th Cir. 1983) ("As an agency of the federal government the Federal Reserve System may not be sued under the Sherman Act."); *Champaign-Urbana News Agency, Inc.* v. *J.L. Cummins News Co.*, 632 F.2d 680, 689, 692 (7th Cir. 1980) (Army and Air Force Exchange Service, "a governmental instrumentality," is not subject to suit under the Clayton Act). Indeed, the Ninth Circuit itself had previously stated that the assertion of antitrust liability against a federal agency was "frivolous." *Department of Water & Power* v. *Bonneville Power Admin.*, 759 F.2d 684, 693 n.12 (1985); see also *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1289 (1985) (Guam, "an instrumentality of the federal government over which the federal government exercises plenary control," is not subject to antitrust liability), cert. denied, 475 U.S. 1081 (1986).

B. The United States Postal Service Is A Federal Agency Or Instrumentality

1. The exclusion of federal agencies and instrumentalities from the term "person" in the antitrust statutes requires reversal of the Ninth Circuit's holding that the Postal Service is subject to antitrust liability. The Postal Service is a quintessential agency or instrumentality of the United States. This country, like most

other nations, has from its beginning treated the furnishing of postal services as a "sovereign function" and a "sovereign necessity." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121 (1981). In fact, our postal system is "the nation's oldest and largest public enterprise." John T. Tierney, *The United States Postal Service: Status and Prospects of a Public Enterprise* at vii (1988) (Tierney).

The Continental Congress in 1775 appointed Benjamin Franklin as the first Postmaster General, with responsibility for postal operations. *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 121. The Articles of Confederation continued federal mail delivery. Act of Oct. 18, 1782, 23 J. Cont'l Cong. 672-673 (G. Hunt ed. 1914). In 1789, the First Congress exercised its authority "[t]o establish Post Offices and post Roads," U.S. Const. Art. I, § 8, Cl. 7, by creating the Office of the Postmaster General to oversee federal postal services. Act of Sept. 22, 1789, ch. 16, 1 Stat. 70.

Congress thereafter established the Post Office and passed restrictions on private mail carriers. Act of Feb. 20, 1792, ch. 7, §§ 3, 14, 1 Stat. 234, 236. The Postal Act of 1845 granted the Post Office exclusive rights to transmit letters and "other mailable matter." Act of Mar. 3, 1845, ch. 43, § 10, 5 Stat. 736. Those statutes created the postal "monopoly" privileges (subject to specified exceptions) that persist in similar form today over the carriage of letters in and from the United States. Those restrictions serve to protect the revenues of the Postal Service to fulfill its mission of serving all customers. *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 519 (1991) (citing 39 U.S.C. 601-606 and 18 U.S.C. 1693-1699); *Regents of the Univ. of Cal.* v. *Public Employment Relations Bd.*, 485 U.S. 589, 593-594, 598 (1988); Joseph F. Johnston,

Jr., *The United States Postal Monopoly*, 23 Bus. Law. 379, 386 (1968). Congress later formally established the Post Office Department as part of the Executive Branch. Act of June 8, 1872, ch. 335, 17 Stat. 283. Accordingly, the sovereign status of postal operations was firmly established when Congress passed the Sherman Act in 1890 and the Clayton Act in 1914 in order to prevent monopolization and other anti-competitive behavior by non-federal enterprises.

At the same time, the Post Office Department underwent several notable changes. In addition to geographically expanding into new territories such as Alaska and Hawaii near the turn of the century, the Post Office initiated free delivery service for America's rural population, and in 1913 began parcel post service despite significant opposition from private "express companies." Carl H. Scheele, *A Short History of the Mail Service* 106-110, 114-118, 143-146 (1970). Those expanded postal services, along with population growth and industrialization, increased the amount of mail handled by the Post Office from approximately 5 billion pieces in 1895 to over 18 billion in 1913, which in turn spurred the Post Office to purchase high-volume machinery and equipment to meet its public responsibilities. *Id.* at 120-121, 139.

Despite its increased commercial activities as a purchaser of goods and services, and as a competitor in parcel post services, the Post Office retained its character as an arm of the United States. Postal operations were managed directly by a cabinet-level officer, the Postmaster General, subject to Acts of Congress that dictated the Post Office Department's wages, capital spending, office locations, and postal rates. Tierney 10 (noting that congressional control over the Post Office

extended "[t]o a degree unmatched in any other executive agency or department").

2. Postal reform later became necessary because the Post Office Department lacked authority to make critical management decisions regarding postal operations and because Congress could no longer manage such administrative details itself. Tierney 9-29. After extensive hearings and debate, Congress in 1970 responded by enacting the Postal Reorganization Act (PRA), Pub. L. No. 91-375, 84 Stat. 719, which transferred the responsibilities of the Post Office Department to today's Postal Service. Congress did not, however, establish the Postal Service as a corporation with a corporate charter or equity ownership interests. Cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 386-391 (1995) (detailing history of government corporations). Thus, contrary to the court of appeals' belief (Pet. App. 11a), Congress made no change in 1970 that would bring the Postal Service within the portion of the definition of "person" in 15 U.S.C. 7 that includes "corporations" organized under the laws of the United States or a State or territory. Rather, Congress created the Postal Service "as an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. Indeed, Congress expressly stated that the Postal Service shall be operated as "a basic and fundamental service" that is "provided to the people *by the Government of the United States* * * * to bind the Nation together through the personal, educational, literary, and business correspondence of the people." 39 U.S.C. 101(a) (emphasis added).

Numerous other provisions of the PRA confirm the Postal Service's fundamentally governmental character. First, the PRA mandates universal public service by providing that "costs of establishing and maintaining

the Postal Service shall not be apportioned to impair the overall value of such service to the people." 39 U.S.C. 101(a). Regardless of profits, the Postal Service must "provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining." 39 U.S.C. 101(b), 403(a). Thus, "[n]o small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities." 39 U.S.C. 101(b). See also H.R. Rep. No. 1104, 91st Cong., 2d Sess. 9 (1970) ("The Postal Service is required to * * * serve as nearly as practicable the entire population of the United States. In [that] respect, the existing concept of universality of postal service is explicitly carried forward.").

Second, the Postal Service is managed by a Board of Governors whose eleven members are "officer[s] of the Government." 39 U.S.C. 202, 205(d). The President appoints nine of the eleven members, subject to Senate confirmation. 39 U.S.C. 202(a). The Governors "shall be chosen to represent the public interest generally, and shall not be representative of specific interests using the Postal Service." *Ibid.* The Presidentially-appointed nine Governors select the Postmaster General, and those members together select the Deputy Postmaster General. 39 U.S.C. 202(c) and (d); see S. Rep. No. 912, 91st Cong., 2d Sess. 3 (1970) (describing the Act's aim to establish "a postal structure and a method of operating that will entrust the management of the U.S. postal service * * * to responsible public officials whose authority derives from the President"). Similarly, Postal Service employees are federal employees within the federal civil service, who take an oath of office and are subject to limitations on political

activity, prohibitions against strikes, and regulations promulgated by the President for Executive Branch employees. 39 U.S.C. 410(b)(1)-(2), 1001, 1011; see H.R. Rep. No. 1104, *supra*, at 14 ("[T]he Postal Service is too important to the people and the economy of this Nation for us to tolerate postal strikes. * * * In the public sector * * * [a] strike would not merely threaten the income of a public enterprise * * * , it would also directly imperil the public welfare.").

Third, the Postal Service has uniquely federal sovereign powers, including the authority to exercise, "in the name of the United States, the right of eminent domain * * * and to have the priority of the United States with respect to the payment of debts out of bankrupt, insolvent, and decedents' estates" (39 U.S.C. 401(9)); to negotiate international postal treaties and conventions (39 U.S.C. 407); to share property and services with other executive agencies of the federal government (39 U.S.C. 411); to borrow on the United States' "full faith and credit" (39 U.S.C. 2006(c)); "to investigate postal offenses and civil matters relating to the Postal Service" (39 U.S.C. 404(a)(7)); and to promulgate federal rules and regulations "as it deems necessary to accomplish the objectives of this title" (39 U.S.C. 401(2)). Likewise, all liabilities incurred by the Postal Service, such as litigation judgments and settlements, are ultimately financed by the public fisc, and Postal Service revenues are formally appropriated by Congress and are held by the United States Treasury in a "Postal Service Fund." 39 U.S.C. 2001, 2003, 2008(c), 2401(a).

Finally, the prices and rates for postal services and goods provided by the Postal Service are set by public officials in furtherance of the public interest. When the Postal Service determines that "changes in a rate or

rates of postage or in a fee or fees for postal services * * * would be in the public interest," 39 U.S.C. 3622(a), the Postal Service submits a recommendation or request to the Postal Rate Commission, which Congress similarly created as an "independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 3601(a). After conducting a public hearing, 39 U.S.C. 3624, the Commission makes a recommended decision to the Governors of the Postal Service, who may "approve, allow under protest, reject, or modify that decision," 39 U.S.C. 3625(a), subject to judicial review, 39 U.S.C. 3628.

Thus, provisions confirming the sovereign status of the Postal Service as an establishment in the Executive Branch pervade the laws governing the Postal Service. In *Lebron*, the Court held that Amtrak, a government corporation that Congress chartered "not [to] be an agency, instrumentality, authority, or entity, or establishment of the United States," 45 U.S.C. 541 (1988), was nonetheless "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." 513 U.S. at 391, 394. The Court made clear, however, that Congress's "disclaimer of agency status * * * is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress's control." *Id.* at 392. Conversely here, Congress's express *preservation* of the Postal Service's status as an "establishment of the executive branch of the Government of the United States," 39 U.S.C. 201, vested with numerous sovereign powers, compels the conclusion that Congress intended to exclude the Postal Service, like other federal entities, from the category of "persons" subject to suit under the antitrust laws.

C. The Postal Service's Sue-And-Be-Sued Clause Does Not Render The Postal Service A "Person" Under The Antitrust Laws

In holding that a cause of action under the antitrust laws may be maintained against the Postal Service, the Ninth Circuit relied solely on the fact that Congress has waived the Postal Service's sovereign immunity by permitting it "to sue and be sued" under 39 U.S.C. 401(1). The court of appeals concluded that such a waiver of sovereign immunity deprives the Postal Service of its sovereign status as a federal governmental entity.[5] Respondents embrace similar reasoning. They argue that the term "person" includes any federal agency or instrumentality that Congress has authorized to sue and be sued, because such an entity "can 'sue and be sued' just *like* any 'corporation[] and association[]'" that is expressly covered by the term "person" in the antitrust laws. Br. in Opp. 3-4 (quoting 15 U.S.C. 7) (emphasis added). That analysis is fundamentally flawed.

1. This Court in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), has already rejected the contention that a sue-and-be-sued clause is sufficient, in and of itself, to create

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[5] Pet. App. 4a ("[T]he Postal Service lost its sovereign status pursuant to the Postal Reorganization Act of 1970 * * * which provides in relevant part that 'The Postal Service shall have the . . . power[] to sue and be sued in its official name.'") (quoting 39 U.S.C. 401(1)); *id.* at 8a ("Although a federal sovereign is not a 'person,' the Postal Service is not a sovereign."); *id.* at 10a ("Here, the Postal Service does not enjoy federal sovereignty."); *ibid.* ("The Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn."); *id.* at 13a ("Congress has stripped the Postal Service of its sovereign status by launching it into the commercial world as a sue-and-be-sued entity akin to a private corporation.").

substantive liability on the part of an agency or instrumentality of the United States. The plaintiff in *Meyer* sued the Federal Savings and Loan Insurance Corporation (FSLIC) under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), contending that, although *Bivens* liability is normally available only against government officials, a cause of action should be recognized under *Bivens* against FSLIC because the agency's sue-and-be-sued clause, 12 U.S.C. 1725(c)(4) (1988), broadly waived sovereign immunity.

This Court unanimously held that the Ninth Circuit had erred in finding that the plaintiff "had a cause of action for damages against FSLIC *because* there had been a waiver of sovereign immunity." *Meyer*, 510 U.S. at 483-484. The Court explained that such "reasoning conflates two 'analytically distinct' inquiries," first, whether there is a waiver of a sovereign immunity, and second, whether Congress intended to create a substantive cause of action against the federal entity. *Id.* at 484; see also *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983) (The sovereign immunity waiver in "the Tucker Act does not create any substantive right enforceable against the United States for money damages. A substantive right must be found in some other source of law.") (citations and internal quotation marks omitted); accord *United States* v. *Navajo Nation*, 123 S. Ct. 1079, 1089 (2003). The Court in *Meyer* accordingly held that, notwithstanding a waiver of sovereign immunity, plaintiffs cannot sue a federal entity unless it is independently evident that "the source of substantive law upon which the claimant relies provides an avenue for relief" against the government and its agencies. 510 U.S. at 484. Turning to the latter inquiry, *Meyer* held that plaintiffs have no *Bivens* cause of action against federal agencies. *Id.* at 484-486.

Contrary to *Meyer*, the Ninth Circuit below did not undertake to determine whether there was an independent substantive basis under the *antitrust laws* for imposing liability against the Postal Service; rather, the court relied exclusively on the sue-and-be-sued clause in the *PRA*. As discussed above, however, no cause of action under the antitrust laws exists against a United States agency or instrumentality. See pp. 8-10, *supra*. And under this Court's decision in *Meyer*, the Postal Service's sue-and-be-sued clause does not furnish a basis for recognizing a cause of action that would otherwise be unavailable against an agency or instrumentality of the United States. Cf. *Sea-Land Serv., Inc.*, 659 F.2d at 244 ("Were sovereign immunity our sole concern, * * * we would hold the named United States agencies and officials answerable in this action.").

In *Meyer*, Congress's waiver of immunity in a sue-and-be-sued clause did not alter FSLIC's status as a federal agency, and it therefore could not furnish a basis for imposing otherwise unavailable *Bivens* liability upon that federal agency. Likewise, nothing in Congress's waiver of sovereign immunity in the sue-and-be-sued clause of 39 U.S.C. 401(1) alters the fundamental sovereign character of the Postal Service or imposes unprecedented antitrust liability on the United States. In other words, "the waiver does not change the fact that the party being sued is still the federal government." *In re Young*, 869 F.2d 158, 159 (2d Cir. 1989) (per curiam). To the contrary, Congress's waiver of the Postal Service's *sovereign* immunity presupposes that the Postal Service *is* part of the federal sovereign. *Robinson* v. *Runyon*, 149 F.3d 507, 517 (6th Cir. 1998) ("The mere fact that Congress even had to explicitly waive the sovereign immunity of the Postal Service in the first place indicates that Congress considered the

Postal Service a federal agency, or otherwise such a waiver would be unnecessary.").[6]

That conclusion is supported not only by this Nation's long history of treating postal service as "a sovereign function" and "a sovereign necessity," *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 121, but also by the numerous current provisions in Title 39 discussed above (pp. 13-16, *supra*) that explicitly refer to and treat the Postal Service as an "independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. Indeed, relying on that very provision of the PRA, the court of appeals, in another part of its decision that we do not challenge here, held that the Postal Service *is* a "Federal agency" that is subject to suit under 28 U.S.C. 1491(b)(1) based on an alleged violation of a statute or regulation governing its procurement decisions. Pet. App. 15a (citing 39 U.S.C. 201 and adopting the reasoning of *Emery*

[6] There are numerous instrumentalities and agencies of the United States that have sue-and-be-sued clauses. *E.g.*, 7 U.S.C. 942 (Rural Telephone Bank); 7 U.S.C. 1506 (Federal Crop Insurance Corporation); 12 U.S.C. 635(a)(1) (Export-Import Bank of the United States); 12 U.S.C. 1441a(a)(5)(J) (Thrift Depositor Protection Oversight Board); 12 U.S.C. 1789(a)(2) (National Credit Union Administration Board); 12 U.S.C. 1819 (Federal Deposit Insurance Corporation); 12 U.S.C. 2013(4) (Farm Credit Banks); 12 U.S.C. 2073(4) (Production Credit Associations); 12 U.S.C. 2093 (Federal Land Bank Associations); 12 U.S.C. 2278a-3 (Farm Credit System Assistance Board); 12 U.S.C. 2278b-4 (Farm Credit System Financial Assistance Corporation); 12 U.S.C. 2279aa-3 (Federal Agricultural Mortgage Corporation); 12 U.S.C. 2289(1) (Federal Financing Bank); 15 U.S.C. 634(b)(1) (Small Business Administration); 15 U.S.C. 714b (Commodity Credit Corporation); 22 U.S.C. 290f (Inter-American Foundation); 22 U.S.C. 2199(d) (Overseas Private Investment Corporation); 29 U.S.C. 1302(b)(1) (Pension Benefit Guaranty Corporation).

Worldwide Airlines, Inc. v. *United States*, 264 F.3d 1071, 1080-1083 (Fed. Cir. 2001)). If Congress, in enacting the PRA, had intended to subject the Postal Service to statutes that otherwise exclude the United States, such as the antitrust laws, Congress naturally would have been expected at least to provide that the Postal Service is *not* an agency or establishment of the United States, as it repeatedly has done with other congressionally created bodies. See, *e.g.*, *Lebron*, 513 U.S. at 391, 392, 394.[7]

The Ninth Circuit's reliance on a sue-and-be-sued clause is also inconsistent with the reasoning this Court employed in *Cooper* in holding that the United States is not a "person" that *may sue* as an antitrust plaintiff when it acts as a purchaser. As the Court recognized,

[7] See also *e.g.*, 2 U.S.C. 801 (Congressional Award Board); 10 U.S.C. 177(a)(1) (American Registry of Pathology); 10 U.S.C. 178(a) (Henry M. Jackson Foundation for the Advancement of Military Medicine); 12 U.S.C. 1701y(a)(2) (National Homeownership Foundation); 12 U.S.C. 1701j-2(b)(1) (National Institute of Building Sciences); 15 U.S.C. 78ccc(a)(1)(A) (Securities Investor Protection Corporation); 15 U.S.C.A. 7211(b) (Public Company Accounting Oversight Board); 16 U.S.C. 544c(a)(1)(A) (Columbia River Gorge Commission); 16 U.S.C. 3701(a) (National Fish and Wildlife Foundation); 16 U.S.C. 5802(a) (Natural Resources Conservation Foundation); 20 U.S.C. 5509(a)(1)(B) (National Environmental Education and Training Foundation); 22 U.S.C. 4411(a) (National Endowment for Democracy); 22 U.S.C. 5841(h)(1) (Democracy Corps); 25 U.S.C. 458bbb(c) (American Indian Education Foundation); 36 U.S.C. 151301(b) (National Fallen Firefighters Foundation); 36 U.S.C. 151701(b) (National Film Preservation Foundation); 36 U.S.C. 152401(b) (National Recording Preservation Foundation); 36 U.S.C. 40701(b) (Corporation for the Promotion of Rifle Practice and Firearms Safety); 42 U.S.C. 290b(a) (Foundation for the National Institutes of Health); 47 U.S.C. 396(b) (Corporation for Public Broadcasting); 49 U.S.C. 24301(a)(3) (Amtrak).

"[t]he United States is a juristic person in the sense that it has capacity *to sue*." 312 U.S. at 604 (emphasis added). The Court nonetheless held that Congress did not intend the United States to be included as a "person" that is protected by and entitled to sue for damages under the antitrust laws. *Id.* at 606. It follows that the United States (or one of its agencies or instrumentalities) likewise is not a "person" that can be sued for treble damages under those laws even when it has the general capacity *to be sued*.

2. The Ninth Circuit erred in relying (Pet. App. 4a-8a, 10a-11a, 12a-13a) on this Court's decisions in *Loeffler* v. *Frank*, 486 U.S. 549 (1988), and *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512 (1984), as a basis for distinguishing cases such as *Cooper* and *Sea Land Services* and imposing antitrust liability on the Postal Service. In *Franchise Tax Board*, the Court held that agencies with a sue-and-be-sued clause cannot invoke sovereign immunity as a defense against otherwise proper administrative garnishment orders. The Court had previously held in *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940), that an agency's sue-and-be-sued clause waives sovereign immunity to a *judicial* garnishment order directed to money owed by the agency to one of its employees. The Court reasoned in *Burr* that "the words 'sue and be sued' in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings," and a garnishment order is "part and parcel of the process * * * for the collection of debts." *Id.* at 245-246. In *Franchise Tax Board*, the Court simply applied the rule of *Burr* to *administrative* garnishment orders, holding that they are "in operation and effect * * * identical to the judgment of a court," such that "it is illogical to conclude that Congress would

have differentiated between process issued by the Board and that of a court." 467 U.S. at 522, 523. Thus, nothing in *Franchise Tax Board* suggests that a sue-and-be-sued clause can be the basis for imposing new substantive liability on a federal agency. To the contrary, the Court noted that the Postal Service was simply a stakeholder of the employee's wages that were the subject of the garnishment order. *Id.* at 520.

In *Loeffler*, the Court similarly held that the Postal Service's sue-and-be-sued clause waives any sovereign immunity defense against an award of prejudgment interest under Title VII of the Civil Rights Act of 1964 because such "awards [are] a normal incident of suits." 486 U.S. at 558. The Court did not suggest that the sue-or-be-sued clause had subjected the Postal Service to suits (or substantive liability) under Title VII to begin with. Rather, in answering the latter question, the Court looked to the provisions of Title VII itself. See p. 24, *infra*.

In concluding that "the Postal Service should be treated as a private corporation," Pet. App. 10a, the Ninth Circuit cited the statement in *Franchise Tax Board* that "[the Court] must presume that the Service's liability is the same as that of any other business," 467 U.S. at 520; accord *Loeffler*, 486 U.S. at 556, as well as the statement in *Loeffler* that, by "including a sue-and-be-sued clause in its charter, Congress has cast off the Service's 'cloak of sovereignty' and given it the 'status of a private commercial enterprise,'" *ibid.* (quoting *Library of Congress* v. *Shaw*, 478 U.S. 310, 317 n.5 (1986)). The Court made those statements, however, in the context of determining the Postal Service's status for purposes of construing the scope of the waiver of sovereign immunity in 39 U.S.C. 401(1). Neither *Franchise Tax Board* nor *Loeffler* suggested

that the Postal Service is not an agency or instrumentality of the United States, or that a sue-and-be-sued clause may by itself create substantive liability against the United States. To the contrary, the Court's decision in *Loeffler* explicitly recognized that the Postal Service's substantive liability under Title VII *does not* derive from either the Postal Service's sue-and-be-sued clause or the provisions of Title VII that apply to *private* parties, but rather derives from separate amendments to Title VII that altered Title VII's definition of "employer" to create a cause of action against federal agencies. 486 U.S. at 558-561, 563. In any event, the Court's decision in *Meyer*, 510 U.S. at 484, which was rendered after both *Franchise Tax Board* and *Loeffler*, specifically requires such an independent source of substantive liability, and makes clear that substantive liability cannot be based solely on Congress's waiver of sovereign immunity in a sue-and-be-sued clause.

3. For similar reasons, respondents err in attempting (Br. in Opp. 6-8) to draw support from the proposition that the sue-and-be-sued clause was a part of Congress's general design that the Postal Service "be run more like a business than had its predecessor, the Post Office Department." *Loeffler*, 486 U.S. at 556 (quoting *Franchise Tax Bd.*, 467 U.S. at 520). That observation says nothing about whether another federal statute, such as the Sherman Act, independently imposes liability on an agency or instrumentality of the United States, the inquiry mandated by *Meyer*, 510 U.S. at 484. As explained above, Congress intended to exclude the United States and its agencies and instrumentalities from the term "person" subject to suit under the antitrust laws. Pp. 6-10, *supra*. Moreover, Congress explicitly did not create the Postal Service as a private business or corporation, but rather constituted it "as an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. Thus, although the Postal Service may have a "commercial *like*" operation, "it functions as part of the federal government," exercises "uniquely governmental powers such as the authority to borrow money backed by the full faith and credit of the United States Government, the right of eminent domain, and the right to negotiate international postal treaties and conventions," and is to "be operated as a basic and fundamental service provided to the people *by the Government of the United States*." *Robinson*, 149 F.3d at 516 (citations omitted) (quoting 39 U.S.C. 101(a)). Accordingly, "[t]he Postal Service may be run in a manner *similar* to a private commercial entity, but it is not a private commercial entity." *Baker* v. *Runyon*, 114 F.3d 668, 670-671 (7th Cir. 1997), cert. denied, 525 U.S. 929 (1998).

The legislative history of the PRA confirms Congress's intent to carry forward the federal governmental character of postal operations in creating the Postal Service, even as Congress sought to improve the efficiency of its operations. Congress passed the PRA to provide the Postal Service with greater bureaucratic independence, thereby seeking to free postal operations from the partisan delays that had accompanied direct political supervision. S. Rep. No. 912, 91st Cong., 2d Sess. 2-4 (1970); H.R. Rep. No. 1104, 91st Cong., 2d Sess. 5-6, 11-21 (1970). The House Report explained that "[t]he Postal Service is a public service but there is no reason why it cannot be conducted in a businesslike way." *Id.* at 11. Congress sought to achieve that objective by providing for a tenure system, political independence, and managerial authority over labor relations, postal rates, and financing. *Id.* at 12-19. Those "busi-

nesslike" features, however, in no way detract from Congress's paramount intent that "[t]he Postal Service is—first, last and always—a public service." *Id.* at 19.

Moreover, Congress specifically rejected earlier legislative proposals to establish the Postal Service as a government corporation. Dorothy G. Fowler, *Unmailable, Congress and the Post Office* 187-191 (1977). As the House Report explained, the PRA "does not provide for a Government corporation, but it does provide for matching responsibility with authority to conduct the affairs of the Postal Establishment on a business like basis, while retaining the public service character of the Nation's mail system." H.R. Rep. No. 1104, *supra*, at 6; accord S. Rep. No. 912, *supra*, at 4 ("[T]he Postal Service is in fact and shall be operated as a service to the American people, not as a business enterprise."); H.R. Doc. No. 313, 91st Cong., 2d Sess. 2 (1970) (message from President Nixon) (endorsing postal reform that would "serve the public interest of all Americans" through an entity akin to "such presently existing independent establishments as the Board of Governors of the Federal Reserve System, the Securities and Exchange Commission, and the National Aeronautics and Space Administration"). In short, "[t]he Postal Service is not a business; it is not at liberty to design its services and policies with its eye on the bottom line. It is a governmental organization serving the American public." Tierney 74.

D. Other Features Of The Antitrust Laws And The Postal Reorganization Act Undermine The Court of Appeals' Holding

1. a. As the Court observed in *Cooper*, 312 U.S. at 606-607, the antitrust laws impose treble damages and criminal penalties on a "person" who violates the anti-

trust laws in circumstances specified in those laws. 15 U.S.C. 1, 2, 13a, 15(a). The Court in *Cooper* thought it "obvious" that Congress did not intend to impose such liability on the United States. 312 U.S. at 607, 609. To this day, in fact, in the exceptional case in which Congress has intended to impose special damages on the United States, it has done so expressly. See 12 U.S.C. 3417(a)(3) (authorizing punitive damages against "agencies or departments of United States" for willful or intentional violation of statutory provisions protecting privacy of financial records). The Ninth Circuit, by concluding that the Postal Service is subject to the antitrust laws by virtue of a sue-and-be-sued clause in its organic act, has by inference created an antitrust cause of action for treble damages against an agency of the United States when Congress itself has declined to do so. In light of the consequences for the public fisc, "to recognize a direct action for damages against federal agencies" would be "inappropriate," because it would create, in the absence of express congressional authorization, "a potentially enormous financial burden for the Federal Government." *Meyer*, 510 U.S. at 486.

That conclusion holds particularly true here, given the breadth, variety, and magnitude of the Postal Service's operations. The Postal Service employs 770,000 federal employees, receives annual revenues of $66 billion, and delivers 200 billion pieces of mail each year by exercising its exclusive rights over the carriage of letters, and by competing with private businesses in the delivery of express-mail, parcel, overseas and other delivery services. United States Postal Service, *2002 Annual Report* 52-53; United States Postal Service, *Transformation Plan* at i (Apr. 2002). In light of economic uncertainties, increased security needs, and advances in communications technology that reduce the

volume of mail, United States Postal Service, *2002 Annual Report* 16; *United States Postal Service*, Transformation *Plan* at i, 1-3, the Postal Service cannot readily afford increased costs that Congress neither intended nor anticipated. Ultimately, the burdens associated with litigation costs, settlements, or judgments under the antitrust laws would be borne by the American public, either through higher service fees or larger budgetary appropriations. 39 U.S.C. 2001, 2003, 2008(c).

There is also no basis for concluding that Congress intended the Postal Service to be governed by the substantive standards of the antitrust laws. Congress has determined that the actions of the Postal Service are presumptively in the Nation's public interest by establishing it as part of the Executive Branch of the United States Government. 39 U.S.C. 201. Congress has therefore entrusted the Postal Service with the responsibility for determining whether its operations are anti-competitive, and, if so, whether other public benefits nonetheless warrant its actions.

b. The Ninth Circuit's decision cannot be justified, nor its harmful consequences minimized, by that court's recognition of an exception from antitrust liability based on "'conduct-based' immunity" if the "action of the Postal Service being challenged was taken at the command of Congress." Pet. App. 13a. Congress never intended federal agencies and instrumentalities such as the Postal Service to be liable to suit under the antitrust laws *at all*. For that reason, any configuration of the Ninth Circuit's "conduct-based immunity" would create a regime and impose costs that Congress never intended by forcing the Postal Service to undergo future litigation to determine the contours of such immunity and to show in a particular case that the

conduct being challenged was "taken at the command of Congress." *Ibid.* "To open the door to [antitrust] claims would only invite endless litigation over both real and imagined claims * * * , imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such * * * claims would itself be substantial." *OPM* v. *Richmond*, 496 U.S. 414, 433 (1990).

Furthermore, the Ninth Circuit's recognition of a "'conduct-based' immunity" (and only such an immunity) is entirely out of place for a federal establishment in the Executive Branch, such as the Postal Service. Congress itself broadly authorized the Postal Service to take all actions "incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers." 39 U.S.C. 401(10). Of particular relevance here, Congress specifically authorized the Postal Service to conduct procurements, such as the purchasing of mail sacks challenged in this case, by giving the Postal Service the power "to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures." 39 U.S.C. 401(3). And as the court of appeals itself pointed out, the Postal Service's procurement decisions under Section 401(3) are subject to the deferential arbitrary-and-capricious standard of judicial review when they are challenged in federal court under 28 U.S.C. 1491(b)(1). Pet. App. 20a.

Indeed, precisely because of the broad authority those provisions confer on the Postal Service, the court of appeals concluded that respondents' cause of action under Section 1700 of the California Business and Professional Code, which applies to "any unlawful, unfair, or fraudulent business act or practice," was preempted. The court reasoned that subjecting the Postal Service

to liability under state law would "impinge upon the Service's right [under 39 U.S.C. 401(3)] to control the character and necessity of its purchases free from state constraint," and "would negate the deferential standard" of review Congress prescribed under 28 U.S.C. 1491(b)(1). Pet. App. 20a. Subjecting the Postal Service to suit and treble damages liability under the antitrust laws would be equally inconsistent with Congress's judgment to vest the Postal Service, as a sovereign entity of the United States, with broad discretion over its operations under federal law.

In terms of Congressional authorization, moreover, there is no basis for distinguishing the government procurement in this case from any number of actions taken by the Postal Service that might disappoint private parties. For instance, in addition to the power to enter into contracts, Congress authorized the Postal Service to set prices for its postal services, negotiate postal treaties, and promulgate regulations with the force and effect of law. Pp. 15-16, *supra*. No conduct taken pursuant to those grants of authority under federal law is subject to antitrust scrutiny because the Postal Service is an arm of the United States and therefore is not a "person" amenable to suit. The Ninth Circuit's decision, by contrast, would require Congress specifically to direct each of the Postal Service's myriad purchasing and other operational decisions in order to exempt them from the application of the antitrust laws, thereby flouting Congress's general intent in creating federal agencies, *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989), and Congress's specific intent in the PRA to eliminate congressional micro-management of postal operations while vesting the Postal Service itself with broad discretion (see pp. 13, 25-26, *supra*). In short, application of the antitrust laws to the Postal

Service would be inconsistent with the regime that Congress itself fashioned for the Postal Service under federal law.[8]

2. Nor is there a valid justification to create antitrust liability against a federal entity like the Postal Service so that private parties such as respondents may seek redress for alleged injuries from the government's procurement decisions. As an initial matter, whether "it is anomalous and unfair for a United States instrumentality to escape the regimen of antitrust laws the Government would compel its rivals in commerce to obey" is "a policy judgment" within the province of Congress, not courts. *Sea-Land Serv., Inc.*, 659 F.2d at 247; accord *Meyer*, 510 U.S. at 486 ("We leave it to Congress to weigh the implications of such a significant expansion of Government liability.").

In any event, Congress has provided avenues for challenging the contracting decisions of federal governmental entities such as the Postal Service. The Postal Service is subject to the Contract Disputes Act

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[8] The submission in the text—that the antitrust laws do not apply to the Postal Service as a *federal* agency, and that an attempt to reconcile their application through invocation of a conduct-based immunity is entirely out of place under the congressional design for the Postal Service—does not implicate the so-called state action doctrine under the antitrust laws. That doctrine does not address the question whether the defendant is a 'person' within the meaning of the antitrust laws, but rather the analytically distinct question whether conduct by a private party or an entity created by state law is immune from antitrust liability because it manifests a clearly articulated and affirmatively expressed state policy and (when the actor is a private person) whether it is performed under active state supervision. See, *e.g.*, *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985); *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48 (1985).

of 1978, 41 U.S.C. 601(2), which sets forth comprehensive procedures for submitting, processing, and adjudicating claims by a contractor against the government. 41 U.S.C. 605-613; see also 39 C.F.R. 955 (establishing Postal Board of Contract Appeals). Respondent Flamingo Industries twice availed itself of the Contract Disputes Act after the Postal Service terminated its contract for default. *Appeal of Flamingo Industries (USA), LTD*, No. 4121 (Postal Board of Contract Appeals filed Oct. 31, 1997); *Flamingo Industries (USA) LTD* v. *United States*, No. 98-722C (Court of Federal Claims filed Sept. 14, 1998).[9]

Nor were respondents without a remedy to challenge what they perceived to be unfair procurement practices by the Postal Service in contracting with respondents' competitors, Mexican suppliers of mail sacks. The Postal Service's regulations provide administrative procedures for bringing challenges relating to the solicitation or award of a contract. 39 C.F.R. 211.2(a)(2). Moreover, as pointed out above, the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, 110 Stat. 3870, gives the Court of Federal Claims jurisdiction over any claim by an "interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. 1491(b)(1). That Act also permits the award of injunctive, declaratory, and limited monetary relief. 28 U.S.C. 1491(b)(2). The Ninth and Federal Circuits have held that the Postal Service is a "Federal agency" subject to the ADRA, and the Ninth Circuit has reinstated

[9] Those cases settled in January 1999.

respondents' ADRA claims against the Postal Service in this case. See p. 4, *supra*. Respondents therefore have specific statutory means to seek relief for their alleged injuries, and there is no justification for taking the extraordinary step of holding that an agency or instrumentality of the United States is subject to suit under the antitrust laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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